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No. 93-1878

IN THE
SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

RICHARD ROE

PETITIONER

V.

LOUISIANA SUPREME COURT, ET AL

RESPONDENT

MOTION TO INTERVENE;
JOINT MOTION FOR PROTECTIVE ORDER;
AND JOINT MOTION TO SHOW CAUSE

Now into court, through undersigned counsel, comes John Doe, who moves to intervene in this case solely for the purpose of keeping his true identity confidential as set forth in this document.

John Doe, joined by Petitioner Richard Roe, moves for a protective order to immediately place Defendants/Respondents' Brief in Opposition and Supporting Documents under seal and further moves that Defendants/Respondents be required to show cause why their documents should not be stricken. The documents at issue improperly reveal the true identity of John Doe who is not a party to this action, whose identity is irrelevant to the subject matter of Roe's petition, and whose identity was revealed to defendants in confidence. Defendants have now willfully and maliciously violated that confidence in an effort to gain advantage in a related case.

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Roe and Doe submit that Doe's true identity is irrelevant, immaterial and impertinent to the instant litigation. It is also constitutionally protected from disclosure.

This case involves First Amendment challenges by Richard Roe to the constitutionality of defendants' practices of requiring/requesting attorney applicants to utter a religious oath (so help me God) during admissions ceremonies and placing religious references (in the year of our Lord) on law licenses. Intervenor John Doe filed a substantially identical suit against the same defendants in 1991. See Doe v. Louisiana Supreme Court, et al, No. 91-1635 (E.D.La.). Before filing this suit, Petitioner Roe had first attempted to become a plaintiff in the Doe case. The trial court denied Doe's motion for leave to name a new plaintiff and Roe initiated this action. Shortly thereafter, in late 1992, Doe voluntarily dismissed his case.

Like Richard Roe in this case, when John Doe filed suit, he also filed a motion for protective order seeking leave of court to proceed anonymously. While defendants opposed the motion for protective order in the Doe case, the voluntary dismissal occurred before there was any ruling on the motion. It is Doe's position that by electing to voluntarily dismiss his suit, the legal controversy between he and the defendants terminated and he was no longer even arguably compelled by FRCP 10(a) to reveal his name. Doe has never given defendants permission to publicly reveal his identity, which necessarily constitutes revealing certain aspects of Doe's religious beliefs or non-beliefs. While the voluntary

dismissal meant there was no order either granting or denying Doe's motion to proceed anonymously, the absence of an order granting Doe's request is not equivalent to a denial nor is it grounds for defendants to publicly disclose Doe's identity which would not have been allowable even if Doe's motion had been denied. If Doe's motion to proceed anonymously had been denied, he would have had two options: reveal his true identity or face involuntary dismissal. Had Doe's motion been granted, defendants could not have revealed Doe's identity except under conditions set by the trial court or with Doe's permission. Because Doe elected to voluntarily dismiss his suit, the issue was never decided. This fact, however, does not grant defendants power reveal Doe's identity after the suit was dismissed. To allow such a tactic would be to deprive Doe and other plaintiffs of any effective right to even request to proceed anonymously; if their request were denied the "choice" between identifying themselves or terminating litigation is non-existent. The plaintiff who decides to forego litigation will nevertheless be subject to defendants' whim and caprice in deciding whether or not to reveal the plaintiff's name. While Doe did not voluntarily dismiss his case under threat of being identified, he believed the dismissal would render his true identity legally irrelevant. He also believed defendants would keep his true identity confidential.

Any other conclusion than that confidentiality must be maintained in circumstances such as these would require a wasting of judicial and party resources. Will a plaintiff who wishes to

voluntarily dismiss be required to litigate the anonymity question before dismissal to protect confidentiality? Will a plaintiff who voluntarily dismisses have to file a post-dismissal motion to ensure confidentiality? With the requirement of FRCP 10(a) mooted by dismissal, why would a court not order confidentiality? And why would a defendant who is no longer being sued want to make the matter public? This case presents one improper reason which should not be tolerated by this Court.

Defendants' decision to reveal Doe's true identity is seemingly intended only to prejudice Roe's case and to cause harm to Doe. The relevance of Doe's true identity to the Roe case is non-existent. It is true that the Roe and Doe cases are substantially similar in the underlying legal issues presented and that Roe and Doe are/were represented by the same attorney. While these facts provide an interesting historical perspective, they do not contribute to the resolution of the legal issues in Roe's Petition for Certiorari. Revealing the true identity of John Doe does not even contribute historic perspective. It is utterly irrelevant, impertinent and immaterial.

Anticipating that defendants will argue that it is necessary for them to reveal Doe's true identity to establish its relevance, Roe and Doe ask that defendants be first required to demonstrate exactly how and why the true identity of a plaintiff in a factually similar but completely independent case which was voluntarily dismissed in 1992 could ever be relevant. Doe is not a party to this action. If defendants meet this initial burden, Roe and Doe

would further request that resolution of the issues relating to Doe's identity be determined by a person who will have no participation in determining the merits of Roe's Petition for Certiorari. Once Doe's identity is revealed, the prejudicial effect on Roe and Doe will be impossible to undo.

Revealing Doe's true identity is also a constitutional deprivation because defendants have necessarily revealed Doe's religious beliefs by connecting the specific allegations in Doe's original complaint (his religious beliefs or non-beliefs) with a specific person (his true identity). While some judges and justices and others may respect Doe's "different" religious views and the private nature of those views, see, e.g., Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) ("religion is perhaps the quintessentially private matter"), other persons may not (apparently including defendants and/or their attorneys). The point, however, is that it is none of anyone's business that Doe even has different views or what those different views may be! No matter how the state learns of a person's religious views, it can never reveal those views without a compelling interest and even then, only the least restrictive disclosure is permissible. In Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963), the Supreme Court established a two-prong test, holding that before an individual's rights may be infringed, it must be demonstrated that there is a "compelling state interest" which justifies the infringement and "that no alternative forms of regulation would [achieve the compelling state objective] without infringing First

Amendment rights." 374 U.S. at 406-07, 83 S.Ct. at 1795-96. The fact that the state knows Doe's true identity does not render disclosure of that information constitutionally permissible.[1]

Defendants obtained knowledge of Doe's true identity because Doe had initially sought to resolve his dispute informally without resort to the courts. Once suit was filed, it was obvious that the person who had previously corresponded with defendants and John Doe were the same person. At all times, however, Doe had asked that

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[1] Because John Doe's true identity is first and foremost irrelevant, immaterial, and impertinent, detailed consideration of the constitutional arguments should be unnecessary at this time. Defendants, however, are well aware of the constitutional arguments which were raised and argued in both the Roe and Doe cases. If this court is not otherwise inclined to strike defendants' references to Doe's true identity as irrelevant, Doe would request the opportunity to fully brief the constitutional issues. The argument is essentially as follows:

To deny Doe the right to proceed anonymously and to have that anonymity maintained following conclusion of the litigation would be tantamount to compelling Doe to publicly profess and practice his religious beliefs as a condition to his being permitted access to the courts. This has been expressly prohibited by the United States Supreme Court. In Torcasco v. Watkins, 367 U.S. 438, 81 S.Ct. 1680 (1961), a man who had been appointed a Notary Public was refused his commission because he would not declare his belief in the existence of God. In finding the Maryland requirement unconstitutional, the U.S. Supreme Court said,

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

367 U.S. at 495, 81 S.Ct. at 1683-84 (emphasis added; footnotes omitted). The revelation of Doe's identity by defendants was a direct consequence of Doe having filed suit in federal court to vindicate his constitutional rights. Neither the courts nor defendants have the right to disclose or to force Doe to disclose Doe's true identity and thus Doe's religious beliefs. The mere filing of suit in federal court raised constitutional matters to which FRCP 10(a) must defer.

his identity be kept confidential. This request was honored almost until the conclusion of Roe's litigation. As counsel for defendants states in her letter to the Court dated June 6, 1994, defendants revealed Doe's true identity in a motion filed in the Fifth Circuit.[2]

While it is true that neither Roe nor Doe objected, any such objection would have been a vain and useless act because the Fifth Circuit had already imposed sanctions against Roe's attorney and threatened further sanctions. Moreover, for any objection to be effective Doe and Roe would have had to have acted in the same manner as they are acting here -- with advance knowledge and prior to distribution to the court. Again, given the posture of this case in the Fifth Circuit (dismissed sua sponte as moot without Roe being afforded the opportunity to brief the mootness issue, after denial of petitions for rehearing and rehearing en banc, and after imposition of sanctions), objection would have been futile and have resulted in further sanctions as promised.

Even if Roe's failure to object might constitute a waiver, Doe was under no obligation to object in a case in which he was not a party. Doe's identity was and is totally irrelevant, immaterial

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[2] In that document, defendants mysteriously said "appellees can now reveal" Doe's true identity. This clearly willful reference suggests that at some time defendants believed Doe's true identity could not be revealed. The change in circumstances is unknown. Doe's case was dismissed more than one year prior to defendants' disclosure of Doe's true identity.

and impertinent to the merits of Roe's Petition for Certiorari.[3] Doe therefore requests that this court not only strike the papers defendants have filed in this court, but that all references to John Doe's true identity which may appear anywhere in the entire record also be ordered stricken or redacted.[4] While it may be

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[3] Defendants' counsel suggests in her June 6, 1994 letter that Doe's identity is relevant to the issue of sanctions imposed against Roe's attorney. This is true only to the extent the Fifth Circuit's decision to impose attorney's fees may have been based on improper consideration of Doe's true identity. Defendants should not be permitted, however, to argue that citation of irrelevant facts magically renders those facts relevant. The fact that defendants might reveal, for example, that Superman is really Clark Kent in no way makes Superman/Clark Kent relevant to this case. If the Fifth Circuit considered such information, their actions would be improper because they considered irrelevant material regardless of the nature of that irrelevant material.

Here, there is no evidence to suggest that the Fifth Circuit considered Doe's true identity except its presence in the record (notwithstanding that defendants obviously wanted the fact considered). Indeed, the record demonstrates substantial hostility toward Roe and his attorney long before defendants revealed John Doe's true identity. If the only basis for overturning the attorneys' fee award is improper consideration by the Fifth Circuit of John Doe's true identity, Richard Roe has an extremely weak argument.

The impropriety of the Fifth Circuit's award of attorneys' fees, however, is more a function of an improper decision on the merits than consideration of irrelevant material. If Roe prevails on any of the arguments raised in his Petition for Certiorari, the attorneys' fee award will necessarily be vacated.

To the extent John Doe's true identity has any relevance to the attorneys fee award, Roe's attorney (against whom attorneys fees were personally assessed) hereby stipulates that if John Doe's identity is found otherwise irrelevant, he will waive his argument that the attorneys fee award should be reversed because defendants revealed and the Fifth Circuit improperly considered John Doe's true identity. Thus, the issue which would give any theoretical relevance to John Doe's true identity is now moot.

[4] There is one additional reference to John Doe's true identity in the trial court record which should be corrected. Doe's identity was mentioned tangentially in an exhibit filed for a different purpose. Defendants' attorney at that time, Dale Wilks, apologized for the inadvertent reference and offered to take any corrective action Doe desired. It was decided at that time

impossible to undo the damage defendants have done to date, an improper disclosure in the Fifth Circuit should not be used to justify a later improper and irrelevant disclosure in the Supreme Court. While only a limited number of people (presumably) are aware of Doe's true identity, many more will become aware of his true identity if disclosures are not stopped and prior disclosures sealed or redacted. If certiorari is granted in this case, it will be virtually impossible to undo defendants' wrong.

Unless and until defendants can establish the relevance, materiality, and pertinence of John Doe's true identity, the papers they have filed in this court should be placed under absolute seal and not subject to review by anyone. If the court agrees that Doe's true identity is irrelevant, Roe and Doe request that defendants' documents be stricken and defendants prohibited from implicitly or explicitly revealing John Doe's true identity. All references in the trial court and the Fifth Circuit record should also be ordered redacted. Roe does not object to defendants being afforded a reasonable amount of time to refile their Brief in Opposition and supporting documents after complying with the terms to be set by the court. If the court rules that Doe's true

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that more harm would be done by calling attention to the matter.

identity is relevant, Doe asks that all papers filed in this court which refer to John Doe's true identity be filed under seal and that all references in he record be sealed.

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Attorney for Intervenor

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served on counsel of record for all parties by deposit of a copy with the United States Postal Service, postage prepaid and properly addressed at New Orleans, Louisiana on this 7th day of June, 1994.